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278-612—67——1

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 601

THE STATE OF WYOMING AND GULF OIL CORPORATION, PETITIONERS

v.

STEWART L. UDALL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. xxx–xxxix) is reported at 379 F. 2d 635.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1967 (Pet. App. xl). The petition for a writ of certiorari was filed on September 11, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether oil and gas deposits retained by the United States in a railroad right of way grant under

the Act of July 1, 1862, 12 Stat. 489, passed to the State of Wyoming under the Act of July 10, 1890, 26 Stat. 222.

STATUTES INVOLVED

Insofar as is here relevant, the Act of July 10, 1890, 26 Stat. 222, provides:

> SEC. 4. That sections numbered sixteen and thirty-six in every township of said proposed State, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, * * *.

Sections 2 and 3 of the Act of July 1, 1862, 12 Stat. 489, 491–492, Section 4 of the Act of July 2, 1864, 13 Stat. 356, 358, amending the Act of July 1, 1862, and the pertinent provisions of the Right of Way Leasing Act of May 21, 1930, 46 Stat. 373, 30 U.S.C. 301, 303, are printed at Pet. 3–7.

STATEMENT

Pursuant to the Act of July 1, 1862, 12 Stat. 489, as amended by the Act of July 2, 1864, 13 Stat. 356, the United States conveyed a right of way to a predecessor of the Union Pacific Railroad Company. The conveyance became effective on December 20, 1884, when the plat of survey of the line was approved. Subsequently, the government's title to certain sections in each township passed to the State of Wyoming for school purposes upon its admission to the Union. Act of July 10, 1890, 26 Stat. 222. The right of way in question lies in such a section.

On October 2, 1952, the State of Wyoming leased the entire section for the removal of oil and gas to an

individual who later assigned the lease to the Gulf Oil Corporation. The lease made no reference to the right of way, and purported to embrace the full acreage in the section.

In 1960, Union Pacific successfully applied, under the provisions of the Act of May 21, 1930, 46 Stat. 373, 30 U.S.C. 301, for a right of way oil and gas lease. The Secretary of the Interior ruled that the mineral rights underlying the right of way had been reserved to the United States in the right of way grant and had not passed to the State by the Act of July 10, 1890, admitting Wyoming to statehood.

This present action was then commenced in a federal district court, seeking relief from the Secretary's decision. The district court dismissed the complaint and, on appeal, the court of appeals affirmed. The basis of its decision was—

> that the congressional intent was that if part of any section to be granted for school purposes had been disposed of under an act of Congress, the state on admission did not get that part of the section. The right to select lieu lands was given but the failure to exercise that right does not enlarge the grant.

ARGUMENT

1. The decision of the court of appeals is correct. It is true that this Court in *United States* v. *Union Pacific R. Co.*, 353 U.S. 112, held that the oil and gas deposits underlying the right of way granted pursuant to the Acts of July 1, 1862, and July 2, 1864, did not pass to the railroad, but were retained by the United States. However, this does not mean that the con-

veyance was of a mere surface easement. As the court of appeals pointed out (Pet. App. xxxviii), under Section 4 of the 1864 Act the railroad was granted the right to extract coal and iron, indicating that more than a mere surface easement had been granted. No interest in the strip passed to the State. The different conclusion sought by petitioners—vesting in them the rights to the underlying oil and gas—would, as noted by the court of appeals (Pet. App. xxxvi), render nugatory subsequent statutes specifically dealing with the retained oil and gas deposits—including the very Act (Act of May 21, 1930, 30 U.S.C. 301, 303) under which the Secretary issued an oil and gas lease to Union Pacific in this case.

2. The decision is not in conflict with any decision of this Court or of any other court of appeals, and involves only the application of an historic distinction between 1862 and 1864 right of way grants, on the one hand, and easements under the Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. 934 *et seq.*, on the other. See *Union Pacific, supra,* and *Great Northern Ry. Co.* v. *United States,* 315 U.S. 262. Moreover, the precise extent of these nineteenth century grants is of limited importance today.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967